

212955

WEINER BRODSKY SIDMAN KIDER PC

BRUCE E. ALEXANDER*
RICHARD J. ANDREANO, JR.
SANDRA L. BRICKEL
JAMES A. BRODSKY
DONALD C. BROWN, JR.
JO A. DeROCHE
TROY W. GARRIS
CYNTHIA L. GILMAN
DON J. HALPERN
MITCHEL H. KIDER
THOMAS LAWRENCE III
ALDYS A. LONDON
JAMES M. MILANO

SUZANNE DE ARMOND MUCCHETTI
HAYDN J. RICHARDS, JR.*
LEAH SCHMULEWITZ GETLAN
R. COLGATE SELDEN
MARK H. SIDMAN
JOHN D. SOCKNAT
DAVID M. SOUDERS
CYNTHIA G. SWANN
MICHAEL S. WALDRON
HARVEY E. WEINER
ROSE-MICHELE WEINRYB
JUSTIN P. ZIMMER*
*NOT ADMITTED IN D.C.

1300 NINETEENTH STREET NW
FIFTH FLOOR
WASHINGTON DC 20036 1609
TEL 202 628 2000
FAX 202 628 2011

January 7, 2005

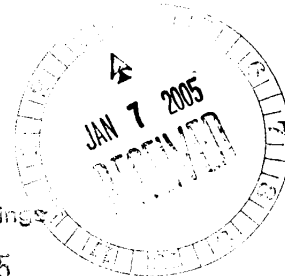
BY HAND

Honorable Vernon A. Williams
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

RECEIVED
Office of Proceedings

JAN 07 2005

Part of
Public Record



Re: Docket No. AB-512X, Sierra Pacific Industries -- Abandonment Exemption -- In Amador County, CA

Docket No. AB-880X, SierraPine -- Discontinuance Exemption -- In Amador County, CA

212956

Dear Secretary Williams:

By this letter, Martell Industrial Center, LLC ("Martell") hereby requests leave to file this Protest in the above-referenced abandonment and discontinuance petition proceeding.¹ Acceptance of this protest will not prejudice petitioning railroads, SierraPine and Sierra Pacific Industries ("Petitioners"), because Petitioners are already well apprised of Martell's position that the subject line should not be abandoned.

In a letter dated December 22, 2004, Martell advised Petitioners' counsel, Richard A. Allen, Esq., that Martell was considering an offer of financial assistance for continued rail service over the subject line.² (A copy of the December 22, 2004, letter was submitted to the Surface Transportation Board (the "Board") on that date.) In the December 22, 2004, letter, Martell described its interest in preserving such rail service. Martell is a landlord of a 190,000-square foot facility with access to the rail line, which facility historically has used rail service. In

¹ Although the regulations at 49 C.F.R. §§ 1152.25, 1152.60 and 1121.4 (including the draft Federal Register Notice at 49 C.F.R. § 1152.60(c)) do not set forth a deadline for filing protests in an abandonment petition proceeding, Martell acknowledges that the Federal Register publication in this proceeding provided that replies to the abandonment petition should be filed with the Board by December 22, 2004. Martell apologizes to the Board for the late filing.

² By letter dated December 13, 2003, Martell had previously requested Petitioners to provide it with the information required by 49 C.F.R. § 1152.27(a).

WEINER BRODSKY SIDMAN KIDER PC

Honorable Vernon A. Williams

- 2 -

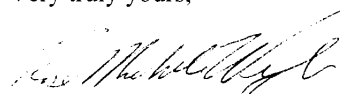
January 7, 2005

addition, Martell owns five as-yet undeveloped acres situated by the rail line. This undeveloped property, which is zoned for industrial use, provides Martell with significant industrial development opportunities (and Petitioners with significant opportunities to increase rail traffic). As Martell stated in its December 22, 2004, letter, "[a]vailability of rail service is an important factor in both keeping and attracting new businesses."

Prior correspondence between Martell and SierraPine's counsel similarly evidenced Martell's opposition to the cessation of rail service over the subject line. In a letter to David H. Dunn, Esq., one of SierraPine's attorneys, dated July 7, 2004, Martell stated "[t]he cessation of rail service by SierraPine has a substantial harmful impact on the financial viability of Martell's plant, its real estate and the current plant operations of its tenant, Landmark Trim USA..." (Copy attached). Similarly, Martell advised Mr. Allen in a September 9, 2004, letter that "Martell has an important financial stake in the status of the Amador Foothills Railroad, both as a current owner of a facility located on the line, and as a developer of future facilities on property situated on the line" (Copy attached).

Accordingly, Martell respectfully requests that the Board accept this Protest. Enclosed for filing in the above-referenced proceeding are an original and 10 copies of this letter. Please acknowledge receipt of the Protest by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,



Rose-Michele Weinryb

Enclosures

WEINER BRODSKY SIDMAN KIDER PC

1300 NINETEENTH STREET NW
FIFTH FLOOR
WASHINGTON DC 20036 1609
TEL 202 628 2000
FAX 202 628 2011

July 7, 2004

BY FACSIMILE AND FIRST-CLASS MAIL

David H. Dun
Dun & Martinek LLP
2313 I Street
Eureka, CA 95501

Re: Amador Foothills Railroad

Dear Mr. Dun:

We represent Martell Industrial Center LLC ("Martell") concerning the termination of rail service by SierraPine over the Amador Foothills Railroad (mp. 0.0 at Lone to mp. 12.0 at Martell), effective May 31, 2004. The cessation of rail service by SierraPine has a substantial harmful impact on the financial viability of Martell's plant, its real estate and the current plant operations of its tenant, Landmark Trim USA ("Landmark"). In a written letter, Martell already directly advised SierraPine of its and Landmark's reliance on rail service over the Amador Foothills Railroad, and expressly requested SierraPine promptly to resume common carrier service. However, SierraPine has not resumed rail service, and yesterday Martell was advised that SierraPine intends to embargo the rail line because of alleged safety concerns.

A rail carrier must obtain authority from the Surface Transportation Board ("STB") not only to dismantle the tracks, but also to terminate service. As set forth in 49 U.S.C. 10903, "[a] rail carrier providing transportation subject to the jurisdiction of the [STB] under this part who intends to—(A) abandon any part of its railroad lines; *or* (B) *discontinue the operation of all rail transportation over any part of its railroad lines, must file an application relating thereto with the [STB],*" and any such discontinuance "may be carried out *only* as authorized under this chapter." (Emphasis added.) Despite SierraPines' protestations to the contrary, the STB has expressly determined that its rail operations over the Amador Foothills Railroad are common carrier operations, subject to the STB's jurisdiction. *See SierraPine – Lease and Operation Exemption – Sierra Pacific Industries*, STB Finance Docket No. 33679, served Nov. 27, 2001 (petition to revoke denied); *SierraPine – Lease and Operation Exemption – Sierra Pacific Industries*, STB Finance Docket No. 33679, served Aug. 26, 2002 (petition for reconsideration denied).

Accordingly, the STB requires a common carrier to provide rail service unless and until it grants the carrier discontinuance authority. If a carrier cannot safely operate over a rail line, the carrier may impose a temporary embargo on the line. See *Bolen-Brunson-Bell Lumber Company, Inc. v. CSX Transportation, Inc.*, STB Finance Docket No. 34236, *Rail General Exemption Authority – Lumber or Wood Products*, Ex Parte No. 346 (Sub-No. 25), 2003 WL 21108185, at *3, served May 15, 2003 (“*Bolen*”). Although a lawful embargo temporarily suspends a carrier’s obligation to provide common carrier service, the embargo does not eliminate the obligation. See *Bar Ale, Inc. v. California Northern Railroad Co. and Southern Pacific Transportation Company*, Finance Docket No. 32821, 2001 WL 833717, at * 3, served July 27, 2001. The STB has noted that a “carrier must remove the embargo and restore safe service within a reasonable period of time.” See *Bolen*, at *3. “An embargo that extends beyond a reasonable time can be construed as an unlawful abandonment, unless abandonment or discontinuance authority is obtained.” *Id.* See also *CSX Transportation, Inc. – Abandonment Exemption – In Summit County, OH*, STB Docket No. AB-55 (Sub-No. 631X), *Terminal Warehouse, Inc. v. CSX Transportation, Inc.*, STB Docket No. 42086, served May 12, 2004 (noting that the STB may award damages for illegal embargos).

SierraPine has not obtained STB authority to discontinue its operations over the Amador Foothills Railroad, and thus retains its common carrier obligation. In a July 2, 2004, letter to Martell, your law firm asserts low traffic volume over the rail line as justification for SierraPine’s cessation of service. However, although the level of traffic over a line may form the basis to obtain STB abandonment or discontinuance authority, it has no bearing on a common carrier’s obligation to provide service. In a July 6, 2004, letter, your law firm changes the justification for ceasing service over the line to safety concerns (but identifies none), and states that an embargo will be placed on the line. However, an embargo is not a long-term solution and does not eliminate SierraPine’s common carrier obligation. Although SierraPine is apparently determined to rid itself of its common carrier obligation, such obligation remains until SierraPine obtains the appropriate authority from the STB.

Martell requests that you identify the safety concerns that justify an embargo of the Amador Foothills Railroad. To the extent that legitimate safety concerns exist on the line, please provide Martell and Landmark with a timetable for the completion of the necessary repairs, so that they can attempt to manage the transportation needs of Martell’s plant for the remaining period of time the plant is without rail service. SierraPine terminated service more than a month ago, and any further delay in restoring service could seriously undermine the financial viability of Martell’s rail plant. SierraPine may not use an embargo as a substitute for STB authority to discontinue its operations. As a common carrier, SierraPine must promptly restore common

WEINER BRODSKY SIDMAN KIDER PC

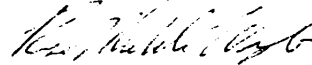
David H. Dun

- 3 -

July 7, 2004

carrier service over the Amador Foothills Railroad, and continue to provide such service unless and until they obtain STB approval to stop.¹

Very truly yours,



Rose-Michele Weinryb

cc: Marc A. Seidner, Member, Martell Industrial Center LLC (by facsimile)
Leo S. Seidner, Member, Martell Industrial Center LLC (by facsimile)
Mario Biagi, Chairman, Amador County Board of Supervisors (by facsimile and first-class mail)
William Huber, General Manager, Landmark Trim USA (by facsimile and first-class mail)

¹ SierraPine, as lessee of the Amador Foothills Railroad, is not the only carrier that retains a common carrier obligation to provide rail service over the line. Sierra Pacific Industries ("SPI"), the owner of the Amador Foothills Railroad) also retains a residual common carrier obligation to provide such rail service, should SierraPine fail to do so. It is unclear whether your law firm also represents SPI in this matter. If it does, please advise us as to SPI's position on its residual common carrier obligation with respect to the Amador Foothills Railroad.

WEINER BRODSKY SIDMAN KIDER PC

1300 NINETEENTH STREET NW
FIFTH FLOOR
WASHINGTON DC 20036 1609
TEL 202 628 2000
FAX 202 628 2011

September 9, 2004

BY FACSIMILE

Richard A. Allen, Esq.
Zuckert Scoutt & Rasenberger, L.L.P
888 Seventeenth Street, NW
Washington, DC 20006-3309

Re: Amador Foothills Railroad

Dear Mr. Allen:

We write this letter on behalf of Martell Industrial Center LLC ("Martell") to determine the status of the Amador Foothills Railroad. Effective July 7, 2004, Sierra Pine formally embargoed the Amador Foothills Railroad (although, by that time, it had ceased providing service without obtaining regulatory authority for more than a month). In your letter dated, July 9, 2004, you advised us that Sierra Pine "does not intend to attempt to restore the line to service." You also advised us that Sierra Pine would seek authority from the Surface Transportation Board to discontinue its operations or abandon the line "as soon as practicable." More than two months have passed since Sierra Pine imposed an embargo over the rail line. As far as we can determine, Sierra Pine has not sought discontinuance or abandonment authority from the Surface Transportation Board, or even initiated the abandonment/discontinuance process.

Martell has an important financial stake in the status of the Amador Foothills Railroad, both as a current owner of a facility located on the line, and as a developer of future facilities on property situated on the line. In response to Martell's request that rail service be resumed on the Amador Foothills Railroad, your July 9, 2004, letter announced Sierra Pine's decision to abandon the rail line. However, since that date, Sierra Pine appears to have taken no steps to obtain the necessary abandonment or discontinuance authority from the Surface Transportation Board. Such inactivity may be an indication that Sierra Pine has reconsidered its decision to abandon the line. Martell is aware that Sierra Pacific Industries, which owns the real property comprising the Amador Foothills Railroad and is part-owner of Sierra Pine, filed a Master Plan with Amador County in 2001 (that the County subsequently approved), which plan contemplated continued rail service by Sierra Pine over the Amador Foothills Railroad. Thus, Martell is

hopeful that Sierra Pine has decided to restore service to the rail line rather than risk the revocation of County approval of the Master Plan.

If, on the other hand, Sierra Pine still intends to abandon the Amador Foothills Railroad, it should promptly obtain the necessary regulatory authority to do so. As we indicated in our July 7, 2004, letter, an embargo may not be used as a permanent means to avoid its common carrier obligation to provide service over the line. Moreover, an embargo must be reasonable not only on the date on which it is imposed, but for the entirety of its duration.

As an initial matter, Martell questions the reasonableness of the imposition of the embargo on July 7, 2004. You have advised Martell that the embargo was justified by safety concerns. Specifically, you note in your July 9, 2004, letter that California Public Utilities Commission ("CPU") advised Sierra Pine of certain FRA defective conditions. However, the mere fact that in late 2003, the Amador Foothills Railroad was not fully compliant with FRA regulations does not mean that the railroad had to be shut down. This is borne out by the fact that Sierra Pine continued to provide rail service over the line for approximately six months after the FRA inspection occurred. In addition, the fact that the FRA approved a remediation plan over a five-year period indicates there was no immediate safety threat.¹ And just five days prior to the imposition of the embargo, Sierra Pine stated in a letter to Martell that it was ceasing rail service because of low traffic volumes; the letter did not mention track conditions or safety concerns as a justification for stopping rail service. This is consistent with recent conversations Martell has had with former employees of Sierra Pine, who indicate that the condition of the rail line does not preclude continued rail service. The combination of these factors raise serious questions concerning the appropriateness of the July 7, 2004, embargo on the Amador Foothills Railroad.

Even assuming (without conceding) that the embargo was reasonable at the time it was first imposed, the embargo does not remain reasonable indefinitely. As you noted in your July 9, 2004, letter, the determination of whether an embargo is reasonable (as opposed to an improper, de facto abandonment) is based on a balancing test of various factors: (i) the cost of the necessary repairs, (ii) the financial condition of the carrier to make such repairs, (iii) the traffic on the line compared to cost of repairs, (iv) the carrier's intent, and (v) the length of the embargo in light of the time necessary to effectuate the repairs and other actions taken by the carrier during the embargo. See *Bolen-Brunsen-Bell Lumber Company v. CSX Transportation, Inc.*, STB Finance Docket No. 34236, 2003 WL 21108185 (served May 15, 2003).

Notwithstanding its apparent inactivity over the past two months, Sierra Pine has stated unambiguously that it intends to abandon or discontinue service over the line, and that it has no intention to repair the line and restore service. Under such circumstances, the first four factors

¹ Although you note that two recent derailments have occurred on the line, you provide no information as to the cause of the derailments, or any other information indicating a direct link between the derailments and the FRA violations cited by CPU in late 2003.

described above are not relevant in determining whether an embargo has become unlawful over time. Only the fifth factor – the length of the embargo – has any bearing on this issue.

In other words, having made the simultaneous determinations to both embargo and abandon (or discontinue service over) the line, only one question remains: What is a reasonable amount of time for Sierra Pine to wait before filing with the Surface Transportation Board for authority to abandon or discontinue the Amador Foothills Railroad? The answer cannot be more than the amount of time it would take a motivated carrier to file, in a diligent manner, for abandonment/discontinuance authority, because the sole purpose of Sierra Pine's embargo is to enable it to obtain such authority. Thus, after almost two months, the process of abandoning/discontinuing the Amador Foothills Railroad already should be well underway.

Please advise us what actions Sierra Pine has taken since July 7, 2004, to abandon/discontinue the Amador Foothills Railroad. In addition, please advise us of the date on which Sierra Pine expects to file with the Surface Transportation Board for authority to abandon or discontinue the subject rail line. Alternatively, if the railroad has decided not to discontinue or abandon service over the Amador Foothills Railroad, please promptly advise Martell of the date on which Sierra Pine intends to resume service over the line.

Very truly yours,



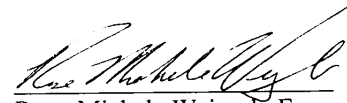
Rose-Michele Weinryb

cc: John F. Hahn, Esq., Amador County Counsel (by first-class mail and facsimile)

CERTIFICATE OF SERVICE

I certify that on January 7, 2005, a copy of the foregoing Protest was served by hand upon the following:

Richard A. Allen, Esq.
Zuckert Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, NW
Washington, DC 20006-3309


Rose-Michele Weinryb, Esq.